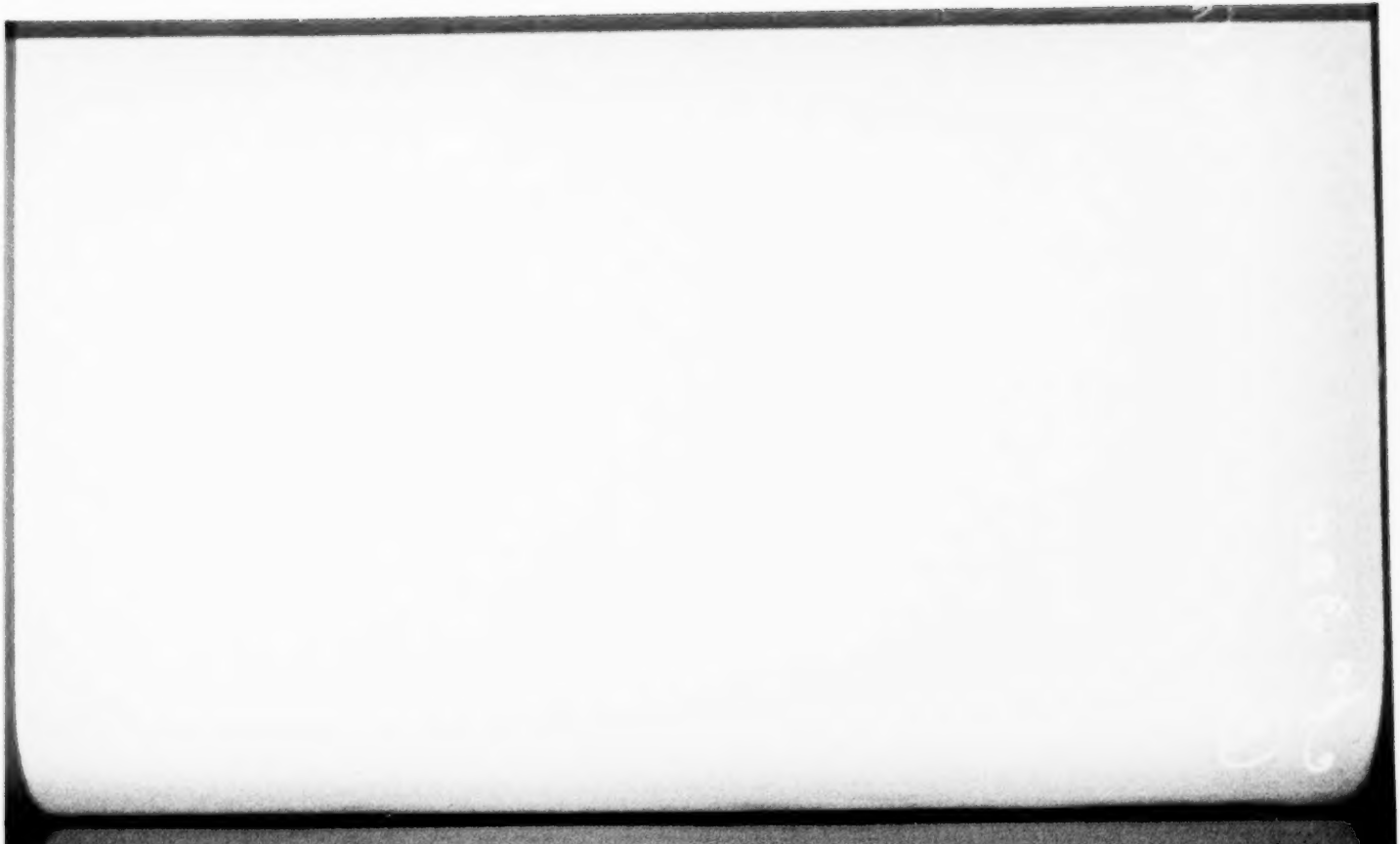

No. 320.

Brf. of M Culloh for P & Cnr

31413
Office Supreme Court U. S.
FILED
JUN 4 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed June 4, 1902.

OCTOBER TERM, 1901.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Plaintiff in Error,

versus

CECIL BROWN, as Administrator of the Estate of David B. Smith, deceased,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Motion of Defendant in Error to Dismiss and Affirm.

Brief of Plaintiff in Error in Opposition to Motion.

ALLAN McCULLOH,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

31414

IN THE

Supreme Court of the United States.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Plaintiff-in-Error,

VERSUS

CECIL BROWN, Administrator of the Estate of David B. Smith, deceased.
Defendant-in-Error.

Brief of Plaintiff-in-Error on Motion to Dismiss.

This is an action on a policy of insurance for $25,000 upon the life of David B. Smith, deceased, and is brought up from the Supreme Court of the Territory of Hawaii by writ of error. The action was commenced by an administrator of the estate of the assured, to whom letters were issued by the Circuit Court of the First Circuit of Hawaii. The defendant-in-error now moves to dismiss the writ, upon the ground that the assignment of errors presents no federal question for the consideration of the Court, and that the alleged errors assigned are frivolous. He also moves for an affirmance of the judgment below, upon the ground that, although the record may show jurisdiction, the

proceedings by writ of error were taken only for the purpose of delay.

The record shows the following facts: The Equitable Life Assurance Society, plaintiff-in-error, which wrote the policy in suit, is a New York corporation, organized and doing business under the laws of that State, and having its principal office there in the City of New York. The policy was written December 7, 1897, and by its terms the company agreed, on receipt of satisfactory proofs of the death of the assured, providing the policy should then be in force, to pay the sum of $25,000 to the assured's executors, administrators or assigns, at the company's office in the City of New York. The assured was a resident of the Territory of Hawaii, and died there intestate December 24, 1899. The policy at the time of the assured's death was in his possession in Hawaii, and came into the possession of defendant-in-error, as the assured's administrator in that Territory. Proof of death was furnished under the policy, and defendant-in-error commenced this action against the company to recover the sum insured. Before the commencement of this action, administrators of the assured's estate were also appointed by the Surrogate's Court of the County of New York, in the State of New York, and the New York administrators have also brought suit against the company, plaintiff-in-error, upon the policy, in the Circuit Court of the United States for the Southern District of New York.

The present action came on for trial in the Hawaiian Territorial Court. The trial judge refused to admit in evidence proof of the appointment of the New York administrators, or of the commencement by them of suit upon the policy in the Circuit Court for the Southern District of New York. To these rulings due exception was taken by plaintiff-in-error. As a result of this trial, defendant-in-error obtained a verdict and judgment for the full amount of the insurance money, and this judgment was on appeal affirmed by the Territorial Supreme Court.

The errors assigned are:

FIRST: That at the time of the trial of this action in the Territory of Hawaii, another action was pending against plaintiff-in-error upon the same policy in the United States Circuit Court for the Southern District of New York, brought by permanent administrators duly appointed by the Surrogates' Court of the County of New York, a duly exemplified copy of which said proceedings in New York is set out in and made a part of the record upon which the judgment of the Supreme Court of Hawaii was rendered.

SECOND. Because of the exclusion as evidence of the exemplified copy of the proceedings upon the appointment of the New York administrators, and the exclusion as evidence of the exemplified copy of the proceedings in the suit brought by them in the United States Circuit Court for the Southern District of New York; all of said exemplified copies having been offered in evidence for the purpose of maintaining that judgment ought not to be entered against the Company, because of the proceedings in New York, and because Section 1, Article IV. of the Constitution of the United States, providing that full faith and credit shall be given in each State to the public acts and judicial proceedings of every other State, which clause was, by Section 905 of the Revised Statutes, made effective in the Territories, required the abatement of the proceedings in the courts of Hawaii, and all of said exemplified copies being offered under claims of exemption from liability to the Hawaiian administrator by virtue of the constitutional and statutory provisions, and of the Act of Congress entitled "An Act to provide a government for the Territory of Hawaii."

ARGUMENT.

Plaintiff-in-error does not question the propriety of payment by it of the amount of the policy in suit. It has always stood ready to pay the face of the policy. But it is willing to pay it only to the person properly entitled to receive payment; and it is not willing to pay the amount of the policy twice. The questions which are presented in the present case are in many respects novel. It is by no means clear to the plaintiff-in-error that payment to the defendant-in-error would constitute any defense to the action which has already been brought upon the policy in the United States Court in New York by the New York administrators. Those administrators assert that they alone have title to the policy in suit; that the policy was assets of the decedent in the State of New York; that by the grant of letters to them and the bringing of suit upon the policy in that jurisdiction it has been reduced to their exclusive possession, and that they alone are entitled to bring suit upon it. If this position, in support of which strong grounds are certainly to be urged, should be sustained, it is evident that payment to defendant-in-error would afford no protection to the insurance company in the suit pending in New York. If, as the New York administrators assert, the issuance of letters to them in that State and the commencement of suit upon the policy in that jurisdiction by them constituted an exclusive appropriation of the policy by them, it is clear that those proceedings were applicable as a bar to the present suit, and that the refusal of the trial Court in Hawaii to admit exemplified copies of those proceedings in evidence in the action there was error, and was a refusal to give faith and credit to judicial proceedings in New York.

Upon the novel and important questions of law which are thus raised, plaintiff in error submits that it is entitled to a decision from this tribunal. It is not unheard of for a debtor to be compelled to pay his

debt twice over by judicial proceedings in two jurisdictions.

> "If the courts of Massachusetts," says Mr. Commissioner EARL in Osgood vs. Maguire, 61 N. Y., 524, 530, "should ultimately hold that defendant is obliged also to pay these notes for the benefit of a Massachusetts creditor, there would be a conflict of jurisdiction much to be regretted. But such a consideration should not induce the courts of this State to yield their jurisdiction over property within this State which they have undertaken to administer for the benefit of all the parties interested."

In Douglass vs Phœnix Insurance Co., 138 N. Y., 209, it would seem that an insurance company was actually subjected to double payments upon the same policy of insurance in consequence of a conflict as to jurisdiction between the Courts of New York and Massachusetts.

> "We deem it unnecessary," says Chief Judge ANDREWS, at page 221 of his opinion in that case, "to consider the position of the defendant. If it may be subjected to embarrassment, or even to a double judgment, it will be in consequence of its own act in voluntarily subjecting itself to the laws of Massachusetts. The power of the court to grant a continuance in a proper case will generally afford a remedy to a party so situated. But the plaintiff ought not to be prejudiced or prevented from collecting his debt in this State."

Threatened with such a situation in the present case, it is not frivolous of plaintiff-in-error to seek from this Court a direction as to where and to whom payment of its obligation may safely be made. If title to the chose in action upon which suit has been brought is exclusively in the possession of the New York admini-

strators, payment to the Hawaiian administrator will not be such a safe payment; and if such is the situation, if the New York administrators have in fact, by virtue of certain judicial proceedings, actually obtained an exclusive title to and control of the policy of insurance in suit, the Hawaiian Courts refused to give full faith and credit to those judicial proceedings when by the rulings of the trial judge, and the decision of the territorial Supreme Court in affirmance of those rulings, they excluded proper evidence of the judicial proceedings in New York.

Defendant-in-error relies upon the case of New England Mutual Life Insurance Co. vs. Woodworth, 111 U. S., 138. It is submitted, however, that the decision of this Court in that case was by no means necessarily conclusive of the controversy presented in the case at bar. In that case, it was pointed out that claims upon policies of life insurance, being simple contract debts, are assets at the domicil of the debtor, and that the question of the physical whereabouts of the written policy is immaterial.

> "The general rule," says Mr. Justice BLATCHFORD (p. 145), "is that simple contract debts, such as a policy of insurance not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found."

That the physical possession of the policy has no bearing upon the question of the right to administer and recover upon it is also clear from the decision of this Court in Union Mutual Life Insurance Co. vs. Lewis, 97 U. S., 682. (See opinion of the New York Court of Appeals to the same effect, in Sulz vs. Mutual Reserve Fund Life Association, 145 N. Y., 563). In the Woodworth case, however, this Court did lay down the rule that, as a matter of convenience, an insurance company must be held to be domiciled for the purpose of administration and suit upon a policy of life insur-

ance, in any jurisdiction within which it was doing business and had an agent upon whom it had authorized process to be served. This rule, however, the Court distinctly declares is one of convenience merely. Upon this subject, Mr. Justice BLATCHFORD, in delivering the opinion of the Court, said (pp. 144, 145):

> "In the growth of this country and the expansions and ramifications of business and the free commercial intercourse between the States of the Union it has come to pass that large numbers of life and fire insurance companies and other corporations established with the accumulated capital and wealth of the richer parts of the country seek business and contracts in distant States which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of the creditors of going to distant places to bring suits on policies and contracts, and from the additional requirement in case of death of taking out letters testamentary or of administration at the original domicil of the corporation debtor in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States. * * * In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has by virtue of those laws a place of business in Illinois and a general agent there and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable on death to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there."

The rule, then, which permits a policy of life insurance like that here in suit to be regarded as assets for purposes of administration and suit, in any jurisdiction in which the defendant company is doing business, is based upon a fiction of law introduced simply for the convenience of claimants who have taken out, or are desirous of taking out, letters of administration in jurisdictions other than that of the actual domicile of the insurance company. This fiction supposes the debtor to be domiciled wherever it is doing business. It is a fiction introduced for the convenience of creditors; and there can be no reason for its employment where it does not tend to the convenience of the creditor and can be used only for the oppression of the debtor.

The rule has been invented to relieve administrators in other jurisdictions from the necessity of taking out letters at the actual domicile of the corporation. It can, therefore, have no application to the present case, where letters upon the assured's estate have been taken out both in the Territory of Hawaii and in the State of New York, the latter being the jurisdiction under the laws of which plaintiff-in-error was organized and is doing business, and within which it has its principal office and its actual domicile; within which, furthermore, at the office of the company in the City of New York, the policy in suit is by its own terms payable.

Many cases might be cited declarative of the familiar principle that, where letters have been taken out in the jurisdiction in which the debtor is domiciled, he will not be protected in case he makes payment to a foreign representative of his creditor's estate.

Chapman vs. Fish, 6 Hill, 554.
Stone vs. Scripture, 4 Lansing, 186.
Pond vs. Makepeace, 2 Metc., 114.
Maas vs. German Savings Bank, 36 Misc., 154.

"Where," says McAdam, J., for the Appellate Term of the New York Supreme Court in the latter case, "at the time of the payment by the

> debtor there is a conflicting grant of letters by the courts of this State, the authorities are unanimous that the foreign administrator is superseded and he has no power to act."

In that case the intestate lived and died in the State of New Jersey, and upon her death letters were there taken out by an administrator who had possession of her savings bank book. To him the defendant, a New York savings bank, paid over the intestate's balance of account. Letters had, however, previous to this payment, been issued in New York to another person as ancillary administrator. This fact was not known to the bank at the time it made the payment in question, but the courts of New York held that the payment to the New Jersey administrator constituted no defense to an action by the ancillary administrator in New York for the amount of the deposit in bank.

> Where an ancillary administration is had, the executor or administrator of the domicil cannot withdraw or dispose of the ancillary assets by direct or indirect means, until the ancillary administration is settled, whether debts are found in the ancillary jurisdiction or not.
>
> Du Val vs. Marshall, 30 Ark., 230.

Although payment to the Hawaiian administrator in the present case would probably have been a good discharge of the debt, had no conflicting letters been issued in New York, and that even without suit or judgment in Hawaii; yet now, it is submitted, a grave question is presented whether the plaintiff in error, if it pays the face of the policy to the Hawaiian administrator, will not be forced to make a second payment upon the same debt in New York.

If no administration had been taken out in New York and no claim had been made by the administrators in that State upon the policy, defendant-in-error could have been treated by a useful fiction as

having title to the policy in suit. That has not been the case, however. New York administrators have been appointed, and have brought suit upon the policy. Their title to it does not rest upon a rule of convenience but upon matters of fact; and when they were granted letters for the purpose of administering on this policy in the jurisdiction of its *situs*, the jurisdiction within which plaintiff-in-error was actually domiciled and within which the debt was, by the terms of the contract, payable; and when they thereafter proceeded to bring suit upon the policy, it may well be asserted that they then became vested with an exclusive title to it, and that it became assets in their hands alone. The admission in evidence of the exemplified copies of the judicial proceedings had in New York would then have displayed the fact that defendant-in-error had no title to the chose sued upon; that it was not assets in Hawaii; that it was assets in a foreign jurisdiction in the possession and under the control of ancillary administrators there appointed, with whose administration of the assets there present the Hawaiian administrator could not, directly or indirectly, interfere. The exclusion of this evidence was, then, error, and it constituted a failure to accord full faith and credit to judicial proceedings had in the Surrogates' Court of the County of New York, and in the Circuit Court of the United States for the Southern District of New York. The question of whether the exclusion was proper is a federal question, and it is not a frivolous one.

The litigation over the policy in suit has been carried on in widely-distant tribunals and at a great expense to plaintiff-in-error, whose only interest in the matter is that payment shall be made to the proper party, and that it shall not be made twice. The questions presented are novel and important. Plaintiff-in-error ventures, therefore, to express the hope that, when this appeal shall be finally decided by this Court, such decision will not be made without some expression of opinion which may serve as the basis of a rule to be

applied in future cases, and in particular in the suit now pending upon the same policy in the federal courts in New York.

The motion to dismiss the writ of error and to affirm the judgment below should be denied.

ALLAN MCCULLOH,
Of Counsel for Plaintiff in Error,
120 Broadway,
New York,
N. Y.

Office Supreme Court U.S.
FILED
MAY 17 1902
JAMES H. McKENNEY,
Clerk.

No. 320

Motion to Dismiss or Affirm

In the Supreme Court

Filed May 17, 1902.

OF THE

UNITED STATES.

The Equitable Life Assurance Society of the United States.

Plaintiff in Error.

v.

Cecil Brown, Administrator of the Estate of David B. Smith, Deceased.

Defendant in Error.

Error to the Supreme Court of the Territory of Hawaii.

MOTION TO DISMISS AND AFFIRM

BY

CECIL BROWN,

Administrator of the Estate of David B. Smith, Deceased, in propria persona.

HONOLULU:
GAZETTE PRINT,
1902.

IN THE

Supreme Court of the United States

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
PLAINTIFF IN ERROR,

v.

CECIL BROWN, ADMINISTRATOR OF THE ESTATE OF DAVID B. SMITH, DECEASED,
DEFENDANT IN ERROR.

MOTION TO DISMISS AND AFFIRM.

Comes now the Defendant in Error herein, and moves the Court to dismiss the Writ of Error in the above-entitled cause for want of jurisdiction because the Assignment of Errors presents no federal question for the consideration of the Court, and because the alleged errors assigned are frivolous.

And the said Defendant in Error, also moves the Court to affirm the said judgment from which the said Writ of Error

purports to have been taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said Writ of Error was taken for delay only.

CECIL BROWN,

Administrator of the Estate of David B. Smith, deceased, Defendant in Error pro se.

Honolulu, T. H., April 24, 1902.

IN THE

Supreme Court of the United States

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
PLAINTIFF IN ERROR.

v.

CECIL BROWN, ADMINISTRATOR OF THE ESTATE OF DAVID B. SMITH, DECEASED,
DEFENDANT IN ERROR.

NOTICE OF MOTION TO DISMISS AND AFFIRM.

To MESSRS. F. M. HATCH AND R. D. SILLIMAN,
Counsel for Plaintiff in Error.

Please take notice that on Monday, the 9th day of June, 1902, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which copies are hereto attached, will be submitted to the Supreme Court of the United States for the decision of the Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

CECIL BROWN,

Administrator of the Estate of David B. Smith, deceased, Defendant in Error pro se.

Honolulu, T. H., April 24, 1902.

Due service of the foregoing notice, motion and brief by copy is hereby admitted at Honolulu, Territory of Hawaii, this 26th day of April, 1902.

F. M. HATCH AND
R. D. SILLIMAN,
Attorneys for Plaintiff in Error.

No. 668 320

Office Supreme Court U.S.
FILED
MAY 17 1902
JAMES H. McKENNEY,
Clerk.

Bf. of Brown, C. E. in Pro. Per

In the Supreme Court

Filed May 17, 1902.

OF THE

UNITED STATES.

The Equitable Life Assurance Society of the United States.

Plaintiff in Error.

v.

Cecil Brown, Administrator of the Estate of David B. Smith, Deceased.

Defendant in Error.

Error to the Supreme Court of the Territory of Hawaii.

BRIEF OF DEFENDANT IN ERROR.

BY

CECIL BROWN,

Administrator of the Estate of David B. Smith, Deceased, in propria persona.

HONOLULU:
GAZETTE PRINT,
1902

31424

IN THE

Supreme Court of the United States

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
PLAINTIFF IN ERROR.

v.

CECIL BROWN, ADMINISTRATOR OF THE ESTATE OF DAVID B. SMITH, DECEASED,
DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This is an action on a policy of insurance for $25,000 upon the life of David B. Smith, deceased. It was brought in the Circuit Court of the First Circuit, Territory of Hawaii, by the administrator of his estate, appointed by a Circuit Judge of said Court sitting in Probate. Another action on the same policy was subsequently brought in the Circuit Court of the United States for the Southern District of New York by ad-

ministrators appointed in the Surrogate's Court of the County of New York. The action in Hawaii was tried before a jury, who rendered a verdict for the administrator, and then went to the Supreme Court of the Territory on exceptions taken by the defendant insurance company. These exceptions were by the higher court overruled, and the case now comes to the Supreme Court of the United States on writ of error allowed by the Chief Justice of the Territory of Hawaii.

Errors Assigned.

The errors assigned are, in brief, as follows: That the judgment of the Supreme Court of the Territory of Hawaii, being the highest court of law and equity of the said Territory in which a decision could be had therein, should be reversed, first, because of the pendency of another action in the Circuit Court of the United States for the Southern District of New York: second, because of the exclusion, as evidence, of the exemplified copy of the proceedings upon the appointment of the administrators aforesaid in the Surrogate's Court of the County of New York, and because of the exclusion, as evidence, of the exemplified copy of the proceedings had in said United States Circuit Court, all of said exemplified copies having been offered in evidence for the purpose of maintaining that judgment ought not to be entered against said insurance company, because of said proceedings in New York and because Section 1, Article 4 of the Constitution of the United States, providing that full faith and credit shall be given in each state to the public acts and judicial proceedings of every other state, which clause of said Constitution was by Section 905 of the Revised Statutes made effective in the Territories, required the abatement of the proceedings in the courts of Hawaii, and all of said exemplified copies being offered under claim of exemption from liability to defendant in error herein by virtue of said clause in said Constitution and said statute

and also by virtue of the Act of Congress of April 30, 1900, entitled An Act to Provide a Government for the Territory of Hawaii.

ARGUMENT.

The defendant in error claims that the courts of the Territory of Hawaii had jurisdiction both of the subject-matter and of the person; and such jurisdiction cannot be ousted by the proceedings of the New York courts, which have not as yet even resulted in a judgment. The facts show that the steps or proceedings taken by the parties in New York were subsequent to those had in the Territory of Hawaii, and even if the rejected evidence offered by plaintiff in error had been admitted, judgment must have been for the defendant in error.

I.

THE "FAITH AND CREDIT" CLAUSE OF THE CONSTITUTION, SEC. 1, ART. 4, AND SEC. 905 U. S. REV. STAT. DO NOT REQUIRE THAT A COURT SHOULD SURRENDER ITS OWN JURISDICTION FIRST ACQUIRED.

In this connection, the opinion of the Territorial Supreme Court overruling the exceptions of the insurance company, is worthy of consideration. The court, by Chief Justice Frear, says:

"Counsel seem to lay special stress upon the 'faith and "credit' clause of the Constitution. That and Section 905 of "the Revised Statutes might require us to regard the appoint- "ment of the administrators in the Surrogate's Court in New "York as valid, provided that court had jurisdiction in the

"matter, but it would not require an abatement of this action "merely because an action had been instituted in the Circuit "Court of the United States, even if that action had been "commenced first. See *Smith v. Lathrop*, 44 Pa. St. 326; "*Stanton v. Embry*, 93 U. S. 548. The effect of the institu- "tion of that action would depend on the application of the "doctrine of *lis pendens* and not upon that clause of the Con- "stitution. No judgment has been rendered in that action. "It is immaterial to this case whether the appointment of the "administrators in New York was valid or not. The appoint- "ment of the administrator here also was valid. The question "is whether the administrator should under the circum- "stances be allowed to recover on the policy. The appoint- "ment of the administrator here preceded the appointment of "the administrators in New York. The proofs of death were "furnished by the administrator appointed here before they "were furnished by the administrators appointed there. "Action was begun here before it was begun there. The "decedent was domiciled here at the time of his death and "had long resided here, and as far as appears had never re- "sided in New York. The policy was applied for here, was "delivered here and was found by the present plaintiff here "among the decedent's papers after his death. The rest of "the decedent's property also was here. The administrator "was appointed here on the petition of the decedent's daughter "who was his only heir. The administrators there were ap- "pointed on the petition of one of the decedent's aunts. The "defendant has a place of business here and a general agent "here. The policy is payable to the assured's administrator. "Service of process was made on the general agent here, who, "we presume, is the person designated for such purpose by the "defendant under the statute (Civ. L. Ch. 130, since amend- "ed, Laws of 1898, Act 45). At any rate, the defendant "answered generally, and did not question the validity of the "service. Under the circumstances, it would seem that, if "there should be any yielding, whether by comity or under "the 'faith and credit' clause of the Constitution or the doc- "trine of *lis pendens* or for any other reason, it should be by "the courts in New York rather than by those here, and such "would seem to be the view taken both in the Federal courts "and in the New York courts. At any rate, the action here "was properly brought and the pendency of a subsequent

"action elsewhere is no ground for an abatement of the prior "action here.

"The leading case is that of the *New Eng. Mut. Life Ins. "Co. v. Woodworth*, 111 U. S. 136. In that case the assured "was domiciled in Michigan when the policy was issued, but "died in New York. Her husband afterwards removed to "Illinois and took the policy with him. The insurance com- "pany was a Massachusetts corporation and the policy was "by its terms payable at its office in Boston, but the company "was doing business in Illinois and could be reached there by "process. It was held that the policy was assets in Illinois, "that the husband was properly appointed administrator there "whether there was other property there or not, that he might "properly sue on the policy there and that payment there "would protect the company from paying a second time in "Massachusetts or elsewhere.

"In *Smith v. New York Life Ins. Co.*, 67 Fed. R. 694, the "assured was domiciled in Illinois when the policy was issued "and at his death. An administrator was appointed in Illinois "who brought suit there on the policy. The assured's wife, "however, had removed to California where she was and had "the policy at the time of his death. It was held, affirming "57 Fed. Rep. 133, that she was properly appointed adminis- "tratrix there and could properly sue there on the policy not- "withstanding the appointment and suit in Illinois.

"In *Gamble v. City of San Diego*, 79 Fed. Rep. 487, it "was held that where a state court had first acquired jurisdic- "tion, a Circuit Court of the United States should either dis- "miss a similar action brought there or else at least suspend "proceedings until the final action of the state court.

"In *Stout v. Lee*, 103 U. S. 66, it was held that where a "state court first acquired jurisdiction, its decree barred fur- "ther proceedings in a Circuit Court of the United States in "a suit begun after suit but before decree in the state court.

"In *Sulz v. M. R. F. L. Ass'n*, 145 N. Y. 563, the assured "was domiciled in New York but was temporarily in Califor- "nia when the policy was issued. He was domiciled and had "the policy in Washington when he died. An administrator "was appointed and brought suit there on the policy. The

"insurance company was a New York corporation and the "policy was payable at its office in New York City. It was "held, reversing the trial court, that, as the Washington court "had first acquired jurisdiction and the policy was there when "the assured died, the New York court should refuse to en-"tertain jurisdiction.

"In *Equitable Life Assurance Society v. Vogel's Execu-"tors*, 76 Ala. 441, 52 Am. Rep. 344, the assured was domi-"ciled in Alabama when the policy was issued and when he "died. The policy was there also. The insurance company "was a New York corporation. It was held that the executrix "appointed in Alabama could maintain an action on the pol-"icy there, although an administrator had been appointed in "New York."

The authorities cited in this decision would seem to settle the question. We, therefore, content ourselves with merely adding the following without discussion:

A policy of insurance is personal property and suit brought by the administrator at the place where the policy is, prevails.

New Eng. Life Ins. Co. v. Woodworth, 111 U. S. 138;
Beach on Law of Insurance, Vol. 2, p. 751, § 1276.
See also *Wyman v. Halstead*, 109 U. S. 654;
Smith v. N. Y. Life Ins. Co., 57 Fed. Rep. 133;
N. Y. Life Ins. Co. v. Smith, 67 Fed. Rep. 694, (same case as that last cited, on appeal).

The contract of insurance is personal in its nature and action may be brought wherever service may be had upon the insurer.

Ins. Co. of No. America v. McLimans, 28 Neb. 653; 44 N. W., 991.

An administrator of the insured appointed in the State *where the policy is and who has possession of the policy* may recover thereon as against an administrator appointed in some other state even though appointed in the state in which insured resided at the time of his death. Thus, if a policy is issued by a New York corporation payable to the legal representatives of the insured, who dies in a foreign state, and administrators are appointed in each state, and an action is first brought on the policy by the foreign administrator, who obtains service of process on an agent of the company, and the courts of that state have assumed jurisdiction of the case, the courts of New York will not assume jurisdiction of a second action brought by the New York administrator. In such a case the principle of comity between states requires a refusal upon the part of the courts of the state where the second action is brought, to entertain jurisdiction.

Sulz v. Mut. Res. Fund L. Assn., 145 N. Y. 563;
Joyce on Insurance, § 3499.

Thus, also, an administrator in New York cannot enforce the payment of a policy of insurance issued by a company incorporated in that state to a resident of the state of Maine, when the policy had never thereafter been within the state of New York, even though the principal office of the company was in the city of New York.

Morrison, Pub. Admr. v. Mutual L. Ins. Co., 10 N. Y. Supp., 445; 57 Hun. 97.

Holyoke v. Union Mutual L. Ins. Co., 22 Hun. 75.

II.

THERE IS NO FEDERAL QUESTION INVOLVED IN THIS CASE. THE CASE REQUIRED NO CONSTRUCTION OF THE CONSTITUTION OR STATUTES.

"Where the question is not as to the validity of the Consti-"tution or Act but merely as to the application of the same to "the case, no Federal question is involved."

2 Desty's Fed. Procedure (9th ed.) § 223, p. 778;
Cameron v. United States, 146 U. S. 533.

III.

THE FEDERAL QUESTION WHICH PLAINTIFF IN ERROR ATTEMPTS TO RAISE IS FRIVOLOUS AND CAN NOT GIVE THE UNITED STATES SUPREME COURT JURISDICTION IN THIS CASE.

"A real and not a fictitious Federal question is essential to "the jurisdiction of this court. *Millinger v. Hartupee*, 6 "Wall. 258; *New Orleans v. New Orleans Water Works*, "142 U. S. 79, 87. In the latter case it was said that 'a bare "averment of a Federal question is not in all cases sufficient. "It must not be wholly without foundation. There must be "at least color of ground for such averment, otherwise a Fed-"eral question might be set up in almost any case, and the "jurisdiction of this court invoked simply for the purpose of "delay.' "

Wilson v. North Carolina, 169 U. S. 586, at p. 595;
Hamblin v. W. Land Co., 147 U. S. 531.

CECIL BROWN,

Administrator of the Estate of D. B. Smith in propria persona, Defendant in Error.

Honolulu, T. H., April 24, 1902.

Supreme Court of the United States.

No. 320.—October Term, 1902.

The Equitable Life Assurance Society of the United States, Plaintiff in Error, *vs.* Cecil Brown, Administrator of the estate of David B. Smith, deceased.	In error to the Supreme Court of the Territory of Hawaii.

[December 1, 1902.]

Mr. Justice White delivered the opinion of the Court.

The questions for decision arise on a motion to dismiss or affirm this writ of error which is prosecuted to a judgment of the Supreme Court of the Territory of Hawaii. The act of April 30, 1900, providing a government for the Territory of Hawaii, (chap. 339, 31 Stat. 141,) enacts (sec. 86) that "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." It follows that the jurisdiction of this court to review judgments of the courts of the Territory of Hawaii is more restricted than is the jurisdiction to review the judgments of the courts of other organized territories, and is to be measured by the power conferred upon this court to review judgments of State courts. (Rev. Stat. 709.) In *Ex parte Wilder's Steamboat Company*, (183 U. S. 545,) the distinction made by the law in question between Hawaii and other territories was pointed out.

The case, as stated below, and as substantially admitted by both parties in their printed argument, is as follows:

David B. Smith died, intestate, on December 24, 1899, in the city of San Francisco. Long prior to and at the time of his death he was domiciled in Honolulu, in the Territory of Hawaii. He there applied to the plaintiff in error, a New York corporation, for a policy on his life payable to his estate. The policy was issued, was delivered to Smith in Honolulu, and was found among his effects in Honolulu after his death. At the instance of the daughter of the deceased, who was his legal heir, the defendant in error was appointed administrator of the estate of Smith by a Hawaiian court having jurisdiction to that end, and the administrator took possession of the policy and made the requisite proof of death. After the

appointment of the Hawaiian administrator and the making by him of the proof of death, a relative of the deceased made application to a court in the city of New York for letters of administration upon the estate of Smith, which were issued. Prior to any attempted action by the New York administrator to enforce the policy in question, in consequence of the refusal of the insurance company to pay the loss, the Hawaiian administrator brought suit in a court in Hawaii having jurisdiction, to recover the amount of the insurance. Service of process in this action was made on the general agent of the insurance company in Hawaii, which agent, the Supreme Court of the Territory declared in its opinion rendered in this cause, "we presume, is the person designated for such purpose by the defendant under the statute. (Civ. L. ch. 130, since amended, laws of 1898, Act 45.) At any rate, the defendant answered generally, and did not question the validity of the service." Before the trial of the cause in the courts of Hawaii the administrator appointed in New York instituted an action upon the policy against the insurance company in the Circuit Court of the United States for the Southern District of New York. When the suit came to trial in the Hawaiian court, no judgment having been rendered in the suit brought in New York, the defendant corporation, to support its contention that the plaintiff was not entitled to recover, claimed the benefit of the due faith and credit clause of the Constitution of the United States, and to sustain this asserted right offered proof of the appointment of the New York administrator and tendered an exemplification of the record of the proceedings had in the action, brought by the New York administrator in the Federal court in that State. The trial court rejected the evidence and exceptions were duly taken. A verdict was returned in favor of the plaintiff for the full amount sued for. The case having been taken to the Supreme Court of the Territory the judgment was affirmed, the court expressly deciding that the right asserted under the due faith and credit clause of the Constitution of the United States was without merit. From the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real substantive question on which the case may be made to turn," that is, "a real and not a merely formal Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has

been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. (*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited.) The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy is *per se* and inherently Federal. (*Swafford* v. *Templeton*, 185 U. S. 487, 493.) It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject. (*Chanute* v. *Trader*, 132 U. S. 210; *Richardson* v. *Louisville & N. R. Co.*, 169 U. S. 128; *Blythe* v. *Hinckley*, 180 U. S. 338.)

Is the motion to dismiss or the motion to affirm within the principles established by prior decisions of this court as just previously stated? In substance, the contention of the plaintiff in error is that on the facts above recited the *situs* of the indebtedness upon the policy in question was an asset solely within the jurisdiction of the State of New York and of its courts, and that the debt had not its *situs* in the Territory of Hawaii, the domicil of the deceased, where the policy was delivered and where it was actually present. But this contention has in effect been decided by this court to be unsound. (*New England Life Insurance Company* v. *Woodworth*, 111 U. S. 138.) In that case recovery was had in a court of the United States in the State of Illinois upon an insurance policy issued on the life of a resident of the State of Michigan by a corporation which had been chartered in the State of Massachusetts. At the time of her death the deceased was still a resident of the State of Michigan. It was argued in this court, on behalf of the defendant in error, that the Illinois court which had granted the letters of administration had no power to do so, because the State of Illinois was not the domicil of the decedent, because there were no assets belonging to the decedent in Illinois at the time of her death, and the bringing of the policy subsequently into Illinois did not constitute the debt thereunder an asset of the estate of the decedent, as such a debt was a simple contract debt and was a local asset only at Boston, the domicil of the debtor company. It was however held that the letters of administration issued by the Illinois court were apparently authorized by

law, and that it was essential that the facts detailed in the record should distinctly negative the validity of such authority, before it could be adjudicated that the plaintiff's authority to sue was not supported by them. The court then said (p. 144):

"This is not done. On the contrary, the declaration of the letters that the intestate had personal property in Illinois when she died, is, we think, supported by what appears in the record, even if such property consisted solely of this policy.

"In the growth of this country, and the expansions and ramifications of business, and the free commercial intercourse between the States of the Union, it has come to pass that large numbers of life and fire insurance companies and other corporations established with the accumulated capital and wealth of the richer parts of the country, seek business and contracts in distant States which open a large and profitable field. The inconveniences and hardships resulting from the necessity on the part of creditors, of going to distant places to bring suits on policies and contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicil of the corporation debtor, in order to sue, has led to the enactment in many States of statutes which enable resident creditors to bring suits there against corporations created by the laws of other States. Such a statute existed in Illinois, in the present case, requiring every life insurance company not organized in Illinois to appoint in writing a resident attorney, upon whom all lawful process against the company might be served with like effect as if the company existed in Illinois, the writing to stipulate that any lawful process against the company, served on the attorney, should be of the same legal force and validity as if served on the company, a duly authenticated copy of the writing to be filed in the office of the auditor, and the agency to be continued while any liability should remain outstanding against the company in Illinois, and the power not to be revoked until the same power should be given to another, and a like copy be so filed; the statute also providing that service upon said attorney should be deemed sufficient service on the company. (Revised Statutes of 1874, chap. 73, § 50, p. 607.)

"In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died."

Indeed, the contention that because the policy was issued by a New York corporation and was payable in the State of New York, it could not be sued upon by one having possession of it at the domicil of the deceased in another State or in a Territory, is directly contrary to the settled rule upheld by the Court of Appeals of the State of New York. (*Sulz* v. *Mutual Reserve Fund Life Association*, 145 N. Y. 163.)

From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Company* v. *Louisiana*, *supra*, and authorities there cited. It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, *Richardson* v. *Louisville and Nashville R. Co.*, and *Blythe* v. *Hinckley*, *supra*. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. The question then is, To which of the motions should the decree which we are to render respond? As this is a case governed by the principles controlling writs of error to State courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, that is, the two questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence also one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other. Under this state of the case (there being of course no inherently Federal question, *Swafford* v. *Templeton*, *supra*,) we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is, the motion to dismiss, and therefore

The writ of error is dismissed.